

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KELVIN EWELL,	§	
	§	No. 704, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	C.A. No. N10M-09-117
	§	Cr. ID Nos. 0508014797
Plaintiff Below,	§	0601000641
Appellee.	§	

Submitted: March 8, 2011

Decided: May 5, 2011

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 5th day of May 2011, having considered the positions of the parties and the Superior Court record on appeal, it appears to the Court that:

(1) On September 19, 2005, the appellant, Kelvin Ewell, was indicted on one charge of Felony Theft.¹ On January 22, 2007, Ewell was indicted on one charge of Theft of Rented Property.² In each case, Ewell failed to appear for arraignment and a *capias* issued.³

(2) Eventually, Ewell was arrested in Pennsylvania as a fugitive on the theft charges and on Delaware parole violations. Ewell signed a waiver

¹ *State v. Ewell*, Del. Super., Cr. ID No. 0508014797.

² *State v. Ewell*, Del. Super., Cr. ID No. 0601000641.

³ In this Order, the Court has referred to the charges collectively as “the theft charges.”

of extradition and was transferred to Delaware on July 1, 2010, where he was committed in default of bail.

(3) On September 14, 2010, Ewell's parole was revoked, and he was resentenced "to serve the balance of the sentence from which he was paroled," including the time he was on absconder status, *i.e.*, from February 15, 2006 until July 1, 2010.⁴ Ewell was then immediately re-paroled and released to serve twelve months at Level IV work release.⁵

(4) On September 28, 2010, Ewell filed a habeas corpus petition in the Superior Court. Ewell sought release from incarceration and dismissal of the theft charges on the basis that his incarceration on the theft charges was illegal. By order dated October 12, 2010, the Superior Court denied the petition on the basis that Ewell "is legally detained and fails to state a claim upon which such a writ may be issued." This appeal followed.

(5) On December 10, 2010, Ewell filed his opening brief. Five days after filing his opening brief, Ewell pled guilty to the theft charges and

⁴ See docket at 22, *State v. Ewell*, Del. Super., Cr. ID No. 30806368DI, (Sep. 20, 2010) (filing of parole letter after hearing); see docket at 11, *State v. Ewell*, Del. Super., Cr. ID No. 9408010902, (Sep. 20, 2010) (filing of parole letter after hearing); see docket at 21, *State v. Ewell*, Del. Super., Cr. ID No. 30807856DI, (Sep. 20, 2010) (filing of parole letter after hearing); see docket at 18, *State v. Ewell*, Del. Super., Cr. ID No. 8805773DI, (Sep. 20, 2010) (filing of parole letter after hearing); see docket at 41, *State v. Ewell*, Del. Super., Cr. ID No. 85002292DI, (Sep. 20, 2010) (filing of parole letter after hearing).

⁵ *Id.*

was sentenced.⁶ For the Felony Theft charge, Ewell was sentenced to two years of incarceration suspended immediately for one year of probation.⁷ For the Theft of Rented Property charge, Ewell was sentenced to sixty days of incarceration, all of which was deemed previously served.⁸

(6) Under Delaware law, habeas corpus provides an incarcerated person the opportunity to obtain judicial review of the jurisdiction of the court ordering the commitment.⁹ Once a person is released from incarceration, the prayer for release is rendered moot.¹⁰

(7) On February 22, 2011, the Clerk issued a notice directing that Ewell show cause why this appeal should not be dismissed as moot. In his response to the notice, Ewell contends that the appeal is not moot, and he requests a judgment on his claims following which, he states, he intends “to seek [a] remedy to expunge” his December 15, 2010 guilty plea and/or a “financial remedy in another court.”

⁶ The State reported this development in its motion to affirm. *See* docket at 9, *State v. Ewell*, Del. Super., Cr. ID No. 0508014797, Babiarz, J., (Dec. 15, 2010) (sentencing after guilty plea); *see* docket at 9, *State v. Ewell*, Del. Super., Cr. ID No. 0601000641, Babiarz, J., (Dec. 15, 2010) (sentencing after guilty plea).

⁷ *Id.* at 10.

⁸ *Id.* at 10.

⁹ Del. Code Ann. tit. 10, § 6902(1). *Hall v. Carr*, 692 A.2d 888, 891 (Del. 1997) (citing *In re Pitt*, 541 A.2d 554, 557 (Del. 1954)).

¹⁰ *See, e.g., Taylor v. State*, 2002 WL 31477136 (Del. Supr.) (affirming Superior Court judgment that habeas corpus petition was moot); *Lee v. State*, 1999 WL 591457 (Del. Supr.) (dismissing appeal as moot); *Crist v. State*, 1997 WL 398923 (Del. Supr.) (dismissing appeal as moot).

(8) Ewell's response to the Clerk's show cause notice is unavailing. Ewell has been released from the incarceration that formed the basis of his habeas corpus petition. As a result, irrespective of their merit, any issues presented in the appeal are rendered moot,¹¹ and the Court's decision on those issues would constitute an impermissible advisory opinion.¹² To the extent he believes he is entitled to additional relief, Ewell will have to pursue those remedies outside the context of this appeal.

NOW, THEREFORE, IT IS ORDERED that the appeal is DISMISSED as moot.

BY THE COURT:

/s/ Carolyn Berger
Justice

¹¹ See, e.g., *Wilson v. State*, 2001 WL 1471694 (Del. Supr.) (dismissing appeal as moot when defendant was released from Level V custody after filing the appeal).

¹² See *id.* (citing *Sannini v. Casscells*, 401 A.2d 927, 930 (Del. 1979)).